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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 398

PHILLIP ADDABBO and MORTON D. STEIN,
as Executor of MAURICE BERG, Deceased,

Petitioner,

—against—

CURTISS-WRIGHT CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The decision of the District Court for the Southern District of New York was delivered on June 20, 1968 and not reported.

The subsequent opinions of the Court of Appeals for the Second Circuit are reproduced in the Appendix of the Petition for Certiorari.

Respondent's Submissions

1. The Court of Appeals does not have the power to entertain and grant a petition for rehearing submitted on November 6, 1969 approximately seven months after the determination of an appeal to said Court of Appeals from the decision of the District Court.

2. The Court of Appeals may not on April 16, 1970 on an untimely petition for rehearing of its order of May 19, 1969 modify a decision of the District Court dated June 20, 1968 after a prior determination by said Court of Appeals on May 19, 1969 of an appeal from the District Court decision, said petition for rehearing being based on a change in state law on July 2, 1969.

3. The Court of Appeals may not entertain and consider an untimely motion for rehearing filed November 6, 1969 in violation of Rule 24(5) of the Rules of the Supreme Court during the pendency of a Petition for Certiorari filed by the instant respondent to the Supreme Court on September 11, 1969.

4. The Court of Appeals may not nullify a Petition for Certiorari filed at a prior date and still undetermined by a subsequent modification of the decision to which the Petion for Certiorari was addressed?

5. The Court of Appeals may not modify a prior decision at any time upon a change in State law affecting such litigation.

6. The Court of Appeals may not deprive the respondent of due process of law because of the modification of the order upon which the Petition for Certiorari was based.

Constitutional Provision and Statute Involved

"(A) Fourteenth Amendment to the United States Constitution, Section I:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Rule 40. Petition for Rehearing

Time for Filing; Content; Answer; Action by Court if Granted. A Petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case. * * *"

"Rule 24. Brief in Opposition—Reply—Supplemental Briefs.

5. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending call-

ing attention to new cases or legislation or other intervening matter not available at the time of his last filing."

Statement of the Case

The litigation arose out of the crash of a passenger transport aircraft near Miami, Florida, on March 25, 1958. The complaint alleged that the crash was caused by the failure of one of the aircraft engines. Braniff Airways owned and operated the DC-7C type aircraft involved and Douglas Aircraft Co. (no longer a party to the litigation) was the manufacturer of the airframe. Curtiss-Wright was the manufacturer of the engine.

The trial was had of the within action before Honorable Irving Ben Cooper, U. S. District Court Judge. Trial was limited to the issue of liability and took place before a jury from June 4th to June 20th, 1968. At the close of the plaintiff's evidence the respondent herein moved for a direction of a verdict in its favor on the Braniff and Berg causes of action of negligence and warranty. This motion was also accompanied by motions by respondent to dismiss the complaints of the petitioner, Addabbo, in breach of implied warranty on the grounds that such causes of action were barred by all applicable statutes of limitations and for failure of proof. The Court granted the motions addressed to dismissals of the causes of action asserted by Addabbo on the basis of implied warranties. The Court also granted the motion for a directed verdict on the Braniff and Berg claims and directed that judgment be entered for Curtiss-Wright. Judgment was accordingly entered on June 26, 1968. Notices of appeal were timely filed by the petitioners herein.

An appeal was taken by the petitioners herein to the Court of Appeals, Second Circuit, which Court on May 19, 1969 entered its opinion and order affirming the dis-

missals of the causes of action in implied warranty of Braniff, Berg, (Stein) and Addabbo but reversing the District Court as to the negligence causes of the actions brought by Braniff and Berg.

On September 11, 1969, a Petition for Certiorari was filed in the United States Supreme Court on behalf of respondent herein seeking review of this determination of the Court of Appeals.

On July 2, 1969, the highest court in the State of Florida reversed the case upon which the Court of Appeals had relied in its affirmance of the dismissal of Braniff's breach of warranty claim. The lower court in Florida had decided the case of *Creviston* v. *General Motors*, 210 S. 2d 755; in which case the Court held that the period of limitation in an implied warranty action is three years and that the action accrues at the time of sale. In its decision of July 2, 1969, the Supreme Court of Florida held that the time of accrual of the cause of action in implied warranty runs from the date of the injury.

On November 6, 1969 the petitioner herein moved before the Court of Appeals to modify its opinion which had been rendered on May 19, 1969.

On November 25, 1969 the Court of Appeals directed both parties to submit briefs as to the motion for modification.

On December 8, 1969 the Petition for Certiorari was denied.

On April 16, 1970 the Court of Appeals modified its first decision and reinstated the cause of action in implied warranty on behalf of Braniff.

The decision of the Court of Appeals on April 16, 1970 stated that it seemed clear that such Court had the power

to enlarge the time to petition for re-hearing citing F.R.A.P. 40.

Reasons for Denying the Petition

The decision of the Court of Appeals for the Second Circuit stated that it seemed clear that they have the power to enlarge the time to petition for re-hearing (citing F.R.A.P. 40) but no citation was given in such opinion as to the source of their power to grant a petition for re-hearing approximately two years after the trial decision and six months after its determination of an appeal and after a Petition for Certiorari had been filed by respondent herein.

The facts and dates as presented heretofore are as follows:

Date of District Court Decision	June 20, 1968
Date of Decision of Court of Appeals	May 19, 1969
Petition for Certiorari filed by respondent	September 11, 1969
Motion to modify decision	November 6, 1969
Request by Court of Appeals for briefs.	November 25, 1969
Petition for Certiorari denied	December 8, 1969
Motion to modify prior determination granted	April 16, 1970

At the time of the sale of the engine in 1956; at the time of the trial and at the time of the first decision of the Court of Appeals, the law of Florida was as expressed in the first decision of the Court of Appeals.

It was not until July 2, 1969 that the law of Florida was changed and it was not until November, 1969 that an untimely petition for re-hearing was submitted to the Court of Appeals.

It is respectfully submitted that such action makes futile any repose of litigation and is an abuse of discretion because of the unreasonable time after its decision that the petition for re-hearing was allowed and modification granted.

In addition thereto it is submitted that petitioners were guilty of laches in that the decision of the Florida Court was in July, 1969; the petition for certiorari filed September, 1969 and the motion to modify the Court of Appeals decision, November, 1969.

Despite the fact that the petitioners herein state in their motion before the Court of Appeals that certiorari was then pending, the motion was granted and modification made.

As stated in *Alexander* v. *Philips Petroleum*, 130 F. 2d 593, the Court stated:

> "Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely, upon the lapse of time."

Further in *O'Brien* v. *Wheelock*, 184 U. S. 450, 22 S. Ct. 354, 46 L. Ed. 636, the Court said as follows:

> "The statute of limitations of Illinois provided that actions on unwritten contracts, express or implied, and all civil actions not otherwise provided for, should be commenced within five years next after the cause of action accrued. Courts of equity

usually consider themselves bound by the statutes of limitation which govern courts of law in like cases. * * *

"The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief.

"And if in this case any ground of relief on the theory of implied contract ever existed, the want of diligence presented an insuperable bar to its assertion."

Nowhere in the motion to modify the first opinion of the Court of Appeals is there any reason presented for the delay from July, the date of the Florida decision, until November, the date of petitioner's motion.

The action of the Court of Appeals, it is submitted, deprived respondent of due process of law in violation of its constitutional rights.

Since the application for modification invoked the equitable powers of the Courts of Appeals, laches was clearly present in the instant litigation.

Respectfully submitted,

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